
DATE: April 14, 1995
CASE NO. 92-ERA-44

IN THE MATTER OF

MICHAEL W. HOLDEN,

COMPLAINANT,

v.

GULF STATES UTILITIES,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

Complainant Michael W. Holden alleges that Respondent Gulf States Utilities (Gulf States) violated the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988), when it discharged him and blacklisted him from employment at other nuclear power plants. Gulf States moved to dismiss the complaint, or in the alternative, for summary judgment because the complaint was not timely as to the discharge and most of the alleged acts of blacklisting. [1] Gulf States argued that it was entitled to judgment on the merits regarding

the alleged incident of blacklisting that occurred within 30 days of the filing of the complaint.

In a Recommended Order (R.O.), the Administrative Law Judge (ALJ) granted Gulf States' motion to dismiss and for summary judgment. The ALJ's recommendation is rejected, and I remand this complaint to the ALJ for further proceedings, including a hearing.

FACTUAL BACKGROUND [2]

Holden began work in September 1990 as a contract employee of S&W Technical Services (S&W) at the River Bend Nuclear Power

---

[PAGE 2]

Station operated by Gulf States. After observing several safety problems at the station, Holden compiled documents to be used to support the internal safety complaint of a co-worker, night shift worker Charles Patrick. After reviewing the documents, Patrick placed them in an envelope addressed to Holden and gave the envelope to another worker for transport to day shift worker Holden.

The employee transporting the envelope instead gave it to supervisor Rodger Barnes, who removed from it some papers that had been taken from his desk without permission. Within 24 hours, Holden was notified that his position was terminated, purportedly because his performance was not satisfactory.

The next day, November 16, 1990, Holden had a routine "exit interview" for departing employees. Holden complained to employees in Gulf States' internal Quality Concerns Program (QCP) that he was being discharged in retaliation for his role in gathering documents to support the report of a safety violation. The QCP employee said that "nothing could be done" and his "hands were tied."

Holden notified S&W representative Tom Roark that he desired a new contract position in the nuclear industry. After several months of seeking, but not obtaining a position for Holden, Roark confided to Holden that someone at Gulf States was telling prospective employers not to hire Holden because he was a troublemaker.

Holden filed a second complaint with Gulf States' QCP that the company was blacklisting him from employment at other nuclear plants. Again, a QCP employee stated that without witnesses, nothing could be done for Holden.

Holden asked Roark to verify to the QCP that Gulf States employees were blacklisting him. Roark stated that he had spoken in confidence and warned that unless Holden dropped his complaint to the QCP, Roark would staple Holden's file shut and cease to recommend him for employment in the nuclear industry. Holden promptly withdrew his second QCP complaint.

Holden was unable to obtain work for a period of 18 months, with the exception of a brief period when he worked as a machinist, at half his usual salary, for a different contractor at the River Bend station. During that employment, a Gulf States employee complained to the contractor and tried to get Holden fired, although he was able to stay on until the end of the job.

Holden filed a third QCP complaint concerning alleged blacklisting by Gulf States and again a QCP employee stated that Holden did not have a case because he lacked witnesses. In a subsequent conversation with an employee of the Nuclear

Regulatory Commission (NRC), Holden learned about the availability of filing a complaint under the ERA.

[PAGE 3]

Holden submitted a complaint to the Department of Labor alleging that Gulf States discharged and blacklisted him because of his role in gathering documents to support a safety complaint to the NRC. The Department referred Holden to the local office of its Wage and Hour Administration, where he filed a formal complaint dated May 21, 1992.

Meanwhile, in April 1992, when Holden informed a Gulf States QCP employee that he intended to file a complaint with the Department of Labor, the employee replied that filing such a complaint would not do any good because Holden had "blown the statute of limitations."

OUTSTANDING MOTIONS CONCERNING THE RECORD

The Gilbert Reports

Gulf States contracted with Fred Gilbert, its former head of security, to perform an independent investigation of two of Holden's quality concerns. Gilbert died after he submitted the two reports ("Gilbert reports"). Citing the privilege afforded to self-critical analysis, Gulf States resisted producing the Gilbert reports pursuant to Holden's discovery request. The ALJ ordered Gulf States to produce the reports, March 11, 1993 Order Compelling Production of Documents, but Gulf States continued to resist the production order.

At Gulf States' request, the ALJ issued a protective order requiring that Holden and his counsel shall not disclose any information in the Gilbert reports except for purposes of a hearing on this complaint and only to specified persons. March 24, 1993 Protective Order Governing Non-disclosure of Confidential Information and Documents. Holden asked the ALJ to reconsider the protective order because it would preclude him from providing any of the information in the reports to the NRC. In response, Gulf States moved to modify the protective order to permit Holden to share the information contained in the reports with the NRC, although he could not give the NRC copies of the reports or portions of them.

The ALJ issued the R.O. without ruling on Gulf States' request to modify the protective order. [3] In a subsequent order, the ALJ found that his jurisdiction in this case ceased when he transmitted his recommended order to the Secretary and he referred Gulf States' request for modification to the Secretary. May 10, 1993 Notice.

Gulf States filed with the Secretary an emergency appeal from the ALJ's Notice, an appeal from the ALJ's order compelling production of the Gilbert reports, and a motion to modify the protective order. Gulf States argues that the privilege for self-critical analysis should prevent production of the reports.

Holden requested that the Secretary withdraw the protective order in its entirety. Complainant's June 8, 1993 Response to

---

[PAGE 4]

Gulf States' Motions. Holden agrees to redact the names of witnesses from the reports and wishes to provide the redacted reports to the NRC, the Congress, and the public. Holden also

has moved to reopen the record to admit the Gilbert reports into evidence. Complainant's June 11, 1993 Motion.

The question whether an ALJ retains jurisdiction in an ERA case to modify a protective order after he has transmitted a recommended decision to the Secretary is one of first impression. In an analogous situation, a federal district court judge retains jurisdiction to modify a protective order, for as long as it is in effect, even after the merits of the underlying case have been determined either by compromise of the parties or by the ruling of an appellate court. *Ex parte Uppercu*, 239 U.S. 435, 440 (1915); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781-782 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982). The courts reason that revisiting the terms of a protective order would not undermine the jurisdiction asserted by an appellate court over the merits of the case.

Likewise, I find that in this case the ALJ retained jurisdiction to modify the protective order, even after he transmitted his recommended decision to the Secretary, because the modification would not alter the terms of the ALJ's recommended decision pending my review. [4] Indeed, an ALJ's jurisdiction over a protective order continues even after the Secretary has issued a final decision, for so long as the protective order is in effect.

I will rule on the various motions concerning the reports. *See* 5 U.S.C. § 557(b) ("On ... review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . .").

The Supreme Court does not favor expansive application of privileges from discovery, *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990), and the lower courts recognize a very limited privilege for self-critical analysis. Gulf States acknowledges that the privilege applies only when "the public interest in maintaining confidentiality outweighs the requesting party's need for the information." Gulf States Appeal from Order Compelling Production of Documents at 10. For example, in *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973), the privilege prevented discovery of the records of a hospital staff investigation committee because of the "enormous public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded."

I find that in this case the overwhelming public interest in

---

protecting whistleblowers who act to promote nuclear power safety outweighs Gulf States' interest in keeping the Gilbert reports confidential. Since Gulf States offered to produce the reports to an investigator charged with determining compliance with the ERA, it will not harm the company unduly to produce the reports to an ERA complainant. Moreover, Gulf States conducted an additional investigation into the subject matter covered by the Gilbert reports and submitted its new report to the NRC.

Consequently, Gulf States' stake in the confidentiality of the Gilbert reports has diminished. Accordingly, I affirm the March 11, 1993 order requiring production of the Gilbert reports.

Turning to the propriety of the protective order, the courts recognize that litigants "have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are free to disseminate the information as they see fit." [5] *Public Citizen*, 858 F.2d at 780; *see Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-36 (1984) and *Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985). As Gulf States recognizes, at the very least Holden must be permitted to share information in the Gilbert reports with the NRC. *See*, *e.g.*, *Brown v. Holmes & Narver, Inc.*, Case No. 90-ERA-26, Final Order Approving Settlement and Dismissing Complaint, May 11, 1994, slip op. at 3-4 (provisions of an agreement settling an ERA case void as contrary to public policy to the extent they restrict the complainant from providing information to the NRC and other government agencies).

To comport with the First Amendment, protective orders may not restrict the dissemination of information obtained from other sources rather than through discovery. *Seattle Times*, 467 U.S. at 34; *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 14 (1st Cir. 1986). Since Holden obtained the reports voluntarily from Mrs. Gilbert rather than through discovery, [6] the protective order may not reach the reports in Holden's possession.

Accordingly, I shall lift the protective order as to the copies of the reports produced by Mrs. Gilbert. To protect individuals' privacy, Gulf States shall redact the names and identifying information of employees from the reports prior to disseminating them. See Comp. June 8, 1993 Response at 9 n.7 and June 11, 1993 Motion. In addition, since the reports have been filed with me, they are subject to the Freedom of Information

Act. As set out below, I will accord Gulf States all the protection allowed under the FOIA.

Holden requests that the Gilbert reports be made a part of the record. In view of Gulf States' failure to produce the reports pursuant to discovery, the reports were not available prior to the time the ALJ granted the motion to dismiss and for

---

[PAGE 6]

summary judgment. The reports mention contacts between Gulf States and GE employees, which is the subject of the allegation on which the ALJ granted summary judgment. Had the reports timely been produced pursuant to discovery, they would have been available for the purpose of opposing the motion for summary judgment. Accordingly, I will admit them into the record for the limited purpose of determining whether there are genuine material issues of fact that would preclude summary judgment. [7] On the issue of admitting the reports into evidence, I will rely on the ALJ's judgment as the evidence unfolds at the hearing.

Other Motions

Gulf States moves to strike Complainant's opening brief on the ground that the type is small and evades the page limitation in the Order Establishing Briefing Schedule, which did not specify a type size. [8] The motion is denied and all of Complainant's briefs to the Secretary are part of the official record.

Holden moved to supplement the record with the response Gulf States filed with the NRC's Office of Investigations concerning its investigation of Holden's allegations in this case. Gulf States opposes the motion. Gulf States argues that if its response to the NRC is included in the record, the NRC's final report on the allegations should also be included. Both Gulf States' response and the NRC's report are made part of the record in this case.

DISCUSSION

Timeliness

The ALJ found that the complaint was untimely as to Holden's discharge and most of the alleged incidents of blacklisting. He further found that Holden timely complained of one alleged incident of blacklisting from a refueling technician job with General Electric Company (GE) because it occurred within 30 days of the complaint he filed in May 1992. R.O. at 3.

Holden argues that, under the continuing violation theory, the complaint was timely as to all of the adverse actions. The Secretary has held that the timeliness of a claim may be preserved under the continuing violation theory "where there is an allegation of a course of related discriminatory conduct and the charge is filed within thirty days of the last discriminatory act." *Garn v. Benchmark Technologies*, Case No. 88-ERA-21, Dec. and Order of Remand, Sept. 25, 1990, slip op. at 6; *Egenrieder v. Metropolitan Edison Co./G.P.U.*, Case No. 85-ERA-23, Order of Remand, Apr. 20, 1987, slip op. at 4. In *Egenrieder*, slip op. at 6, the Secretary found that blacklisting, by its nature, is a continuing course of conduct and may constitute a continuing violation if it is based upon an employee's protected activity.

The ALJ stated that if Holden had no knowledge of Gulf

[PAGE 7]
States' alleged blacklisting until about the time he filed his complaint, the continuing violation theory would make all his blacklisting claims timely. The judge found, however, that the continuing violation theory did not apply because in early 1991 Roark gave Holden reason to suspect that blacklisting was occurring, but Holden did not file the complaint until a year later. The ALJ cited as support *Doyle v. Alabama Power Co.*, Case No. 87-ERA-43, Final Dec. and Ord., Sept. 29, 1989, slip op. at 2, *aff'd, Doyle v. Secretary of Labor*, 949 F.2d 1161 (11th Cir. 1991), *cert. denied*, 121 L.Ed. 2d 162 (Oct. 14, 1992), in which the former Secretary found that the continuing violation theory did not apply to a blacklisting claim because no alleged discriminatory act occurred within 30 days of the filing of the complaint. *Doyle* is inapposite here because the alleged blacklisting from the GE job occurred within 30 days of the filing of Holden's May 1992 complaint. Under the continuing violation theory outlined in *Garn* and *Egenrieder*, all of Holden's blacklisting claims are timely and he is entitled to a hearing on those claims.

The discharge, however, was not similar in subject matter and was not a recurring event. Rather, the discharge had:

> the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate[.]

Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986). *See also Garn*, slip op. at 6 (continuing violation theory does not apply to consummated acts such as discharge). I therefore find that the continuing violation theory does not apply to Holden's discharge. In considering separately whether the complaint was timely concerning the discharge, the courts recognize three bases for equitable tolling of the limitation period in whistleblower protection statutes such as the ERA. *See, e.g., School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). One of the bases is when "the defendant has actively misled the plaintiff respecting the cause of action." *Id.*

Holden alleges that QCP personnel affirmatively lied to him when he asked them about possible recourse concerning his discharge and on two later occasions when he complained about blacklisting. Holden states:

> I specifically asked a Mr. Spranger . . . from Quality Concerns what redress was available for me to pursue my complaints against GSU, either internally through

---

[PAGE 8]
Quality Concerns or others. I was told that "nothing could be done" and that Quality Concerns' "hands were tied" in connection with any claims I had against GSU.

Holden Affidavit (Aff.) at p. 2, attached to Comp. Response to Motion to Dismiss, etc. Holden emphasizes that in 1992 a QCP employee told him that "it wouldn't do [him] any good now" to pursue his complaint about discriminatory discharge and blacklisting because he had "blown the statute of limitations." Holden Aff. at p. 4. He argues that the limitation period was equitably tolled because Gulf States actively misled him about the availability of filing an ERA complaint. Comp. Opening Br. at 16-17.

Ignorance of the law alone is not sufficient to warrant equitable tolling of the limitations period. *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991); *Kang v. Department of Veterans Affairs Medical Center*, Case No. 92-ERA-31, Final Dec. and Ord., Feb. 14, 1994, slip op. at 4, *petition for review pending*, No. 94-4057 (2d Cir. filed Apr. 12, 1994). However, equitable tolling is justified when an employer's complaint handling process causes confusion that deters a complainant from timely filing a complaint. *Larry v. The Detroit Edison Co.*, Case No. 86-ERA-32, Sec. Dec. and Ord., June 28, 1991, slip op. at 17-19, *aff'd in relevant part sub nom. The Detroit Edison Co. v. Secretary, U.S. Dep't of Labor*, No. 91-3737 (6th Cir. Apr. 17, 1992).

If contract employees such as Holden were told that the QCP program either was the sole or the best means to report safety concerns, this case would be similar to *Larry*, where the limitation period was equitably tolled because of the confusing nature of the employer's process for handling complaints. On the other hand, if workers were told that the QCP program was one means to address safety issues in addition to other avenues of redress, it would be difficult to show that Gulf States affirmatively misled Holden simply by not informing him of his rights under the ERA. A remand will afford the parties the opportunity to submit evidence concerning whether equitable tolling is justified as to the timeliness of the allegation concerning discharge. *See, e.g., McGough v. United States Navy, RIOCC*, Case Nos. 86-ERA-18-20, Remand Dec. and Ord., June 30, 1988, slip op. at 9 (remand for hearing where arguments concerning equitable tolling raise significant factual issues requiring resolution through testimony and presentation of evidence).

Summary Judgment

The ALJ granted summary judgment to Gulf States on the blacklisting allegation concerning a position with GE. A motion

---

for summary judgment in an ERA case is governed by 18 C.F.R. § 18.40 and 18.41. *Trieber v. Tennessee Valley Authority*, Case No. 87-ERA-25, Sec. Dec. and Ord., Sept. 9, 1993, slip op. at 7. A party opposing a motion for summary judgment "must set forth specific facts showing that there is a genuine issue of fact for hearing." 19 C.F.R. § 18.40(c).

In support of its motion, Gulf States submitted the affidavit of Holden's supervisor, Barnes, who disavowed any contact with GE concerning Holden's suitability for employment. Aff. of Rodger Barnes at p. 4 par. 11. A technical recruiter employed by GE Nuclear Energy stated in an affidavit that

Holden's resume was on file and nothing in the company's files indicated that anyone from GE communicated with any Gulf States employee concerning Holden's suitability for employment. Aff. of Jennifer P. Cameron at p. 2 par. 3,4.

The ALJ found that Holden submitted no evidence to counter the affidavits submitted by Gulf States. However, the second Gilbert report contains statements which, if found to be true, show that Gulf States employees were blacklisting Holden. Holden was not able to submit the report to counter Gulf States' affidavits because, notwithstanding diligent discovery efforts, he obtained a copy outside the discovery process on the same day that the ALJ granted summary judgment.

The second Gilbert report demonstrates that there are genuine issues of material fact concerning alleged blacklisting of Holden with GE. Accordingly, the grant of summary judgment is reversed, and Holden is entitled to a hearing on the final incident of alleged blacklisting.

CONCLUSION

This case is REMANDED to the ALJ for further proceedings consistent with this Order, including a hearing and a new recommended decision on the complaint.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
The National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the employee protection provision of the ERA to provide a 180-day limitation period for complaints filed on or after its effective date, October 24, 1992. Holden filed this complaint in March and May 1992. Therefore, the 30-day limitation period applies in this case.

[2]
For purposes of the motion to dismiss, the allegations in the complaint are accepted as true. *Garn v. Benchmark Technologies,* Case No. 88-ERA-21, Dec. and Ord. of Remand, Sept. 25, 1990, slip op. at 2; *Willy v. The Coastal Corp.*, Case No. 88-CAA-1, Dec. and Ord. of Remand, June 4, 1987, slip op. at 3.

[3]
Holden obtained copies of the reports from Gilbert's widow on April 22, 1993, the same day that the ALJ issued the R.O.

[4]
I note that upon transmission of a recommended decision, an ALJ loses jurisdiction to modify the recommended decision itself.

See, e.g., Dutile v. Tighe Trucking, Inc., Case No. 93-STA-31, Remand Order, Mar. 16, 1995, slip op. at 3 (no authority for ALJ to revise terms of a recommended decision pending before the Secretary).

[5]
A district court judge has wide latitude to modify or lift a protective order. *Public Citizen*, 959 F.2d at 791; *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984). In this case, on review of the order entered by the ALJ, the Secretary similarly has wide latitude. 5 U.S.C. § 557(b).

[6]
Holden did not obtain the Gilbert reports through discovery from Gulf States. Mrs. Gilbert provided the reports to Holden with an affidavit outlining a business records exception to the hearsay rule. As a non-party, Mrs. Gilbert was not subject to any of the authority of the ALJ to compel production of the reports. *See Malpass and Lewis v. General Electric Co.*, Case Nos. 85-ERA-38 and 85-ERA-39, Final Dec. and Order, Mar. 1, 1994, slip op. at 21. Therefore, the production of the reports to Holden was voluntary and Holden effectively obtained the reports outside of the discovery process.

[7]
As a part of the record in this case, the Gilbert reports will be subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988). Gulf States' request for a protective order will be treated as a designation of confidential commercial information. I have placed a notice prominently displayed in the record of this case directing that the procedures in 29 C.F.R. § 70.26 be followed if a FOIA request is received that encompasses the reports. In that event, the Department will notify Gulf States and afford it a reasonable period of time to state its objections to disclosure. The Department will further notify Gulf States if a decision is made to disclose the information. *See* 29 C.F.R. § 70.26 (1994).